United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

75-1393

B
Pgs

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75 - 1393

UNITED STATES OF AMERICA,

Appellee,

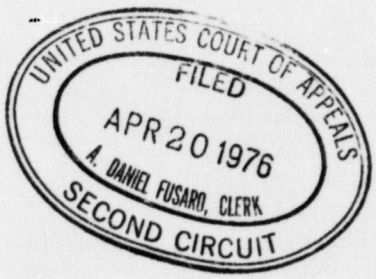
-vs.-

JOE TRUMAN BOYD, ET AL.,

Appellants.

On Appeal From The United States District Court
For The Southern District Of New York

SUGGESTION FOR REHEARING EN BANC
IN BEHALF OF APPELLANT ROBERT E. FORD



HENRY J. BOITEL
Attorney for Appellant
Robert E. Ford
233 Broadway
New York, New York 10007
(212) RE 2-8104

10

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75 - 1393

UNITED STATES OF AMERICA,

Appellee,

-vs.-

JOE TRUMAN BOYD, ET AL.,

Appellants.

On Appeal From The United States District Court
For The Southern District Of New York

SUGGESTION FOR REHEARING EN BANC IN BEHALF OF APPELLANT ROBERT E. FORD

Robert E. Ford petitions the Court for rehearing en banc (F.R.A.P., Rule 35), upon the grounds that consideration by the full Court: (1) is necessary to secure or maintain uniformity of its decisions, and (2) the questions presented are of exceptional importance.

Questions Presented For Rehearing En Banc

1. Should this Court formulate a multiple conspiracy charge which will make clear the circumstances under which a defendant is entitled to an acquittal?

2. Should the jury be charged that, if multiple conspiracies are found to exist, the conspiracy of which the defendant is found to be a member must have a venue basis in the district of trial, and that it is not sufficient if only one or more of the other proven conspiracies has such a venue basis?

Prior Proceedings

After a jury trial before the Honorable Milton Pollock in the Southern District of New York, the appellant Robert E. Ford, an attorney, was convicted upon one count of conspiracy (18 U.S.C. § 371) and fifty-two substantive counts with respect to alleged fraud and misstatements relating to the funding of a public company and the sale of its securities (18 U.S.C. §§ 1001, 1341, 1343; 15 U.S.C. §§ 77e, 77q). The indictment, as consolidated with another related indictment, named sixteen defendants and four unindicted co-conspirators. The government's bill of particulars named an additional thirty-three unindicted co-conspirators. Thus, the overall conspiracy was alleged to have had at least fifty-four participants (A. 16, 100).

At the same trial, four other defendants were

convicted and seven defendants were acquitted.

On April 15, 1976, a panel of this Court affirmed the convictions as to each of the five appellants in a brief memorandum order (Appendix A, annexed hereto).

Statement of the Relevant Facts

The conspiracy count of the indictment, which named all defendants, alleged the following to be the objective of the conspiracy:

> "The object of the conspiracy was to obtain control of a 'shell' corporation without any substantial assets, inflate artificially its price, and sell, pledge and distribute the shares at enormous profits to members of the public without providing material information required to be furnished by law." (A. 18)

The conspiracy count also alleged that the conspiracy was 'carried out' by several distinct means:

> "1. Evasion of registration requirements;
>
> "2. Certification of a false statement as to the capital structure of the corporation;
>
> "3. Creation of an artificial market in the corporation's stock by means of manipulation;
>
> "4. The making of false statements and writings in connection with the Securities and Exchange Commission investigation of the corporation;
>
> "5. The sale, pledging and other disposition of corporate stock to lenders, factors and purchasers." (A. 18-20).

The appellant Ford is a resident of Abilene,

Texas, where he has been a member of the Bar of that State for over twenty-six years. He was essentially a small town lawyer, whose practice involved trial work, real estate and land transactions. He is an honorably discharged veteran of World War II, and has never been convicted of a crime (A. 1327-8).

Ford was never an officer or board member of the Corporation (A. 1328). His involvement in the case commenced solely by virtue of his being retained with respect to contracts and title opinions for certain acquisitions that eventually became corporate assets. As to other acquisitions, he had no involvement or knowledge (A. 1399).

Ford never discussed the issuance of stock with anyone; he never spoke in person or by phone with any broker in New York concerning the Corporation or its stock; he never gave an opinion to anyone to the effect that the stock could be free-traded; nor did he ever give any quotation as to the value of the stock (A. 1399). He never pledged or sold any of the stock, nor did he ever discuss the fabrication of evidence to be given to the SEC (A. 1400-2). No government witness testified that he engaged in any of these activities.

Significantly, there was no showing that Ford had any expertise with respect to the securities laws. Indeed, he has never even had a stock brokerage account (A. 1400).

Much of the government's proof at trial involved the creation in New York of a market for the Corporate stock by means of a variety of illegal manipulative procedures. Most of the persons involved in those manipulations testified as government trial witnesses, including one Alan Segal, a notorious criminal recidivist who specializes in stock fraud transactions.* None of the persons engaged in these activities ever had anything to do with the defendant Ford, nor was there any evidence at trial that Ford had any knowledge that such market manipulations were occurring.

Reasons for Granting Rehearing En Banc

As indicated by our statement of facts, supra, much of what the indictment charged to be objectives of one overall conspiracy was not shown at trial to have been within the knowledge or contemplation of the defendant Ford. In giving a multiple conspiracy charge to the jury, the trial court recognized that a jury issue was presented as to whether the indictment had wrongfully charged as one what were, in fact, several distinct conspiracies. The issues presented for review relate to the question of whether the trial court properly charged the jury on that question. This Court recently granted a

---

*See, e.g., United States v. Finkelstein, 526 F. 2d 517 (2d Cir., 1975).

petition for a writ of habeas corpus with respect to a State criminal conviction upon the ground that the State judge had inadquately instructed the jury with respect to the standard for liability in a homicide case. Circuit Judge Lumbard's opinion for the majority provides an appropriate introduction to the reasons why we urge rehearing en banc in the present case:

> "Even if the jury were aware of the need to determine causation, the court's instruction did not provide the tools necessary to that task. The possibility that jurors, as laymen, may miscontrue the evidence before them makes mandatory in every case instruction as to the legal standards they must apply. See: United States v. Burse, Docket No. 75 - 1388 (2d Cir., March 8, 1976), slip op. at 2509. Error in the omission of an instruction is compounded where the legal standard is complex and requires that fine distinctions be made***" (Kibbe v. Henderson, Docket No. 75 - 2128 (2d Cir., April 8, 1976), slip op. at 3090-1).

I

THE TRIAL COURT'S CHARGE ON THE MULTIPLE CONSPIRACY ISSUE WAS INADEQUATE AND CONFUSING AND DID NOT GIVE THE JURY PROPER GUIDANCE WITH RESPECT TO THE ISSUE OF MULTIPLE CONSPIRACIES.

In its charge, the trial court went on at length concerning the manner in which a defendant may be held liable for conspiratorial activities unknown to him and for acts of unknown conspirators (Tr. 2529-2532; A. 868-870). Then the trial court gave its charge with respect to multiple conspiracies. The totality of that part of the Court's charge was as follows:

> "Proof of several separate conspiracies is not proof of the single, overall conspiracy charged in the indictment unless one of the several conspiracies which is proved is the single conspiracy which the indictment charges. What you must do is determine whether the conspiracy charged in the indictment existed between two or more conspirators. If you find that no such conspiracy existed, then you must acquit. However, if you are satisfied that such a conspiracy existed, you must determine who were the members of that conspiracy.
>
> "If you find that a particular defendant is a member of another conspiracy, not the one charged in the indictment, then you must acquit the defendant. In other words, to find a defendant guilty you must find that he was a member of the conspiracy charged in the indictment and not some other conspiracy." (A. 870)

Those two paragraphs of the charge are derived from a portion of a charge which was found by this Court to

have been proper in United States v. Tramunti, 513 F. 2d 1087, 1107 (2d Cir., 1975). We respectfully submit that whatever may have been the appropriateness of the above noted charge, within the context of the remainder of the charge given in Tramunti, and within the context of the nature of the facts in Tramunti, it was certainly inacequate in the present case. The above two quoted paragraphs must have been incomprehensible to the jury. We ask this Court to examine those paragraphs carefully in order to determine whether they could have made proper sense to the jury.

In United States v. Cohen, 518 F. 2d 727 (2d Cir., 1975), this Court reaffirmed the rule in this circuit with respect to the multiple conspiracy charge that ought to be given to the jury:

> "The trial court also fully instructed the jury that they could not convict unless they found the defendants had been engaged in a single conspiracy rather than engaged in separate or multiple conspiracies. Cohen objects that the court's instruction that '...if you find that the government has failed to prove the existence of only one conspiracy, you must find the defendants not guilty' was an 'all or nothing' charge similar to the one found impermissible in United States v. Kelly, 349 F. 2d 720, 757-758 (2d Cir., 1965), cert. den. 384 U.S. 947 (1966). Such instructions have been held proper in recent cases. See, e.g., United States v. Sperling, 506 F. 2d 1323, 1341 (2d Cir., 1974); United States v. Bynum, 485 F. 2d 490, 497 (2d Cir., 1973).***" (518 F. 2d 727 at 735 [Emphasis added]

The Court's charge herein thoroughly missed the point that if all of the activities specifically charged

in the conspiracy count of the indictment are shown, in fact, to have been a conglomeration of separate conspiracies, then the jury is obliged to acquit. Whatever else the Court's charge means, if anything, it certainly doesn't mean that. Indeed, in Tramunti, supra, this Court noted as follows:

> "***While there is language in United States v. Calabro, 449 F. 2d 885, 894 (2d Cir., 1971) that 'it is better practice to instruct the jury that they must acquit if they find multiple conspiracies when only one conspiracy is charged,' the decision was that a failure so to charge is not error where the charge examined as a whole stresses that there must be a finding of the single conspiracy charged and individual knowing participation by each individual in it. (Id). ***In that situation, where only separate and distinct conspiracies are shown, and the single conspiracy alleged is not proven, acquittal is required and the request must be given.***" (513 F. 2d at 1107-8) [Emphasis added]

The affirmance in Tramunti made clear that the two paragraphs in question were not the determinative factor on the issue of whether the jury had been adequately charged. Instead, Tramunti emphasized the totality of the trial court's charge in that case, as well as the marshalling of the evidence by the Court as to each defendant. In contrast, the only instructions given to the jury in the present case as to multiple conspiracy consisted of the two above quoted paragraphs.

The trouble with a case like Tramunti, which this Court appears to have limited to its facts (See: United States v. Tramunti, supra, at p. 1107, fn. 26)

is that the conceptual problems presented by the thorny thicket of multiple conspiracy have led the district court judges to seize upon language that has appeared to weather the storm of appeal.

Counsel can frankly represent to the Court that those who practice at the trial court level are almost uniformly in a state of confusion as to what this Court believes should be the charge on multiple conspiracy.

The rather liberal evidentiary rules under which one can be held liable under the conspiracy theory demand, at least, a clear, unequivocal and meaningful jury charge with respect to the multiple conspiracy issue. It is respectfully submitted that the present case presents an appropriate vehicle by which this Court, en banc, can call a halt to the existing confusion.

II

THE TRIAL COURT ERRED IN REFUSING TO CHARGE THE JURY THAT THE PARTICULAR CONSPIRACY AS TO WHICH THE DEFENDANT MIGHT BE FOUND TO BE A MEMBER MUST ALSO BE FOUND TO HAVE VENUE BASED IN THE SOUTHERN DISTRICT OF NEW YORK.

In the instant case, the conspiratorial acts upon which venue was laid in the Southern District of New York involved market manipulation activities as to which there was no trial proof whatsoever that the defendant Ford had any knowledge or anticipation. The activities in which he is alleged to have improperly

engaged all occurred in the Western United States and all related to corporate acquisitions of the Corporation in question.

As we read the trial court's charge on multiple conspiracy, supra, it, at best, charged the jury that if the defendant was not a member of any conspiracy charged in the indictment, they must acquit him.*

If that charge is correct (and we submit it is not) then the defendant could be found guilty even if the overall conspiracy charged by the indictment was in fact a grouping of five distinct conspiracies of only one of which the defendant was a member. Assuming this to be true, the pellet of the conspiracy shotgun which accurately landed on the defendant must at least have had some venue basis within the Southern District of New York. Lack of venue is a jurisdictional defect, United States v. Gross, 276 F. 2d 816, 819 (2d Cir., 1960); United States v. Grossman, 400 F. 2d 951 (4th Cir., 1968). Failure to establish venue against a defendant taints the indictment, makes it defective and requires its dismissal. United States v. Johnson, 323 U.S. 273, 275 (1944); Article II,

---

* "If you find that a particular defendant is a member of another conspiracy, not the one charged in the indictment, then you must acquit the defendant. In other words, to find a defendant guilty you must find that he was a member of the conspiracy charged in the indictment and not some other conspiracy." (A. 870)

Section II, Paragraph 3, and the Sixth Amendment of the United States Constitution.

Following the Court's charge, counsel for Ford specifically requested that the Court charge the jury with respect to the requirement of venue in relation to the multiple conspiracy problem:

> "[Defense counsel]: Your Honor said, in effect, if the jury finds there is a conspiracy to commit any of the crimes in the first indictment [sic], and an overt act committed in the Southern District of New York in furtherance of that crime, that conspiracy, then you may find the defendants guilty.
>
> "I ask your Honor to charge specifically if they find there was a conspiracy to commit one of the crimes in that indictment, they must find that an overt act directed toward that particular conspiracy must be committed in the Southern District of New York. In effect there were four conspiracies rolled into one. The jury may find that there is one, but yet, as to the one they feel ---
>
> "The Court: I would think that you would mount confusion on confusion by asking me to add to what I think is otherwise a very clear statement of the multiple conspiracy situation as announced by the Court of Appeals in a case that was tried by Judge Duffy. I assume you are familiar with the case I am talking about.
>
> "[Defense counsel]: Tramonti?
>
> "The Court: Yes.
>
> "[Defense counsel]: The problem here is that there are certain problems for some defendants who never left Nevada or Texas, or whatever, and although I realize there is confusion, I think that is caused by the inclusion of one ---
>
> "The Court: That would breed confusion

rather than clear anything." (A. 901-903).

The government purported to deal with this issue at p. 47 of its brief on appeal. They cited no authority for the refusal of the trial court to charge as to venue with respect to the multiple conspiracy issue. There does not appear to be any decided case in this circuit on this issue. The trial judge's refusal to relate the venue problem to the multiple conspiracy issue was upon the ground that it would "mount confusion on confusion". (Supra). That the jury may be confused by telling them what the law is does not constitute a proper basis for proceeding as though the law did not exist. By refusing to charge as requested by counsel, the Court effectively withdrew that issue from the jury as regards the multiple conspiracy problem. The effect of the Court's deficient multiple conspiracy charge combined with its deficient charge on venue geometrically multiples the probability that the defendant was wrongfully convicted. We respectfully urge that this Court, en banc, speak clearly to the issue.

Conclusion

For all of the above reasons, this Court should grant rehearing en banc.

Respectfully submitted,

HENRY J. BOITEL
Attorney for Appellant
Robert E. Ford

United States Court of Appeals

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 15th day of April , one thousand nine hundred and seventy-six.

Present:

HON. TOM C. CLARK
Associate Justice, United States Supreme Court, Retired
HON. WILLIAM H. TIMBERS
HON. ELLSWORTH A. VAN GRAAFEILAND

Circuit Judges.

UNITED STATES OF AMERICA, Appellee, v. JOE TRUMAN BOYD, ERNEST DARWIN GOODLOE, ROBERT E. FORD, ERNEST R. MULLENAX and M. S. KNISELY, Appellants.	75-1393 75-1424 75-1426 75-1432 76-1048

Appeals from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of conviction of said District Court be, and they hereby are, affirmed as to all appellants on all counts upon which the were convicted, except that, pursuant to the government's concession, the conviction of appellant Mullenax is reversed on substantive counts 2-26, 29-37 and 41-48. Under all the circumstances, it is neither necessary nor appropriate to remand for reconsideration of the sentence imposed on Mulle ax on the counts which are affirmed. See United States v. Blitz, slip op. 2761, 2795 n. 46 (2 Cir. March 25, 1976).

We have carefully considered all of appellants' claims of error and w find them to be without merit. Appellants were convicted of serious crime after a fair trial on the basis of overwhelming evidence. We order that the mandate issue forthwith.

TOM C. CLARK
Associate Justice

WILLIAM H. TIMBERS

ELLSWORTH A. VAN GRAAFEILAND

Circuit Judges.